

Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Saga Communications of New England, L.L.C. |) | FRN 0002749406 |
| |) | NAL/Acct. No. 200732080018 |
| Licensee of Station WAQY(FM), Springfield, |) | Facility ID No. 58551 |
| Massachusetts |) | File No. EB-06-IH-0825 |
| |) | |

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 2, 2007

Released: March 2, 2007

By the Chief, Investigations and Hearings Division:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find Saga Communications of New England, L.L.C. (“Saga”), licensee of Station WAQY(FM), Springfield, Massachusetts, apparently liable for a monetary forfeiture in the amount of \$4,000 for violation of Section 73.1216 of the Commission’s rules.¹ That rule requires a broadcast licensee to “fully and accurately disclose the material terms of the contest . . . and conduct the contest substantially as announced or advertised.”² As discussed below, we find that Saga failed to conduct its contest substantially as announced, in apparent violation of the Commission’s rule.

II. BACKGROUND

2. The Commission received a complaint from Mr. Robert Naginewicz alleging that Saga failed to conduct its contest involving the musical group Aerosmith,³ which was broadcast by the station during the June through July 2005 period, according to that contest’s advertised rules. According to Mr. Naginewicz, on July 17, 2005, he won the contest’s “Grand Prize Giveaway,” the prizes for which included a free two-year lease on a 2005 Buick LaCrosse automobile, or its cash equivalent, from the co-sponsor, Bob Pion Pontiac, and a “trunk load full” of Aerosmith memorabilia.⁴ Mr. Naginewicz alleges that although he was assured by the station’s staff that all of his prizes would be delivered to him by July 22, 2005, he did not receive the monetary portion until August 18, 2005, and that, despite numerous queries made of the station’s staff, he was still awaiting delivery of the memorabilia portion as of December 31, 2005, almost a half year after the contest had concluded.⁵

¹ 47 C.F.R. § 73.1216.

² *Id.*

³ See letter from Mr. Robert Naginewicz to the FCC, dated December 31, 2005 (“Complaint”).

⁴ *Id.* at 1-2.

⁵ *Id.* at 2-3.

3. Following Mr. Naginewicz's complaint, the Enforcement Bureau ("Bureau"), by letter dated January 24, 2006,⁶ inquired of Saga concerning these allegations. Saga responded on March 2, 2006,⁷ contending that its one-month delay in delivering the monetary portion of the prize, although less than ideal, was "within the zone of reasonableness."⁸ It acknowledges, however, that its failure to fulfill the memorabilia portion until after Mr. Naginewicz had contacted the Commission, represents a station "problem" that it claims it has since addressed and resolved.⁹ Saga indicates that, because of its delay in fulfilling its promise to Mr. Naginewicz, it enhanced the award made to him by contributing additional prizes.¹⁰ We note that the complainant did not submit any reply or further comment in this matter.

III. DISCUSSION

4. Under Section 73.1216 of the Commission's rules, a broadcast licensee must conduct station-sponsored contests "substantially as announced or advertised," and must disclose fully and accurately the "material terms" of such contests.¹¹ Material terms, among other things, include any eligibility restrictions, means of selection of winners, instructions regarding entry and participation, when prizes can be won and the extent, nature and value of prizes.¹²

5. It appears that Saga violated Section 73.1216 of the Commission's rules by failing to conduct the contest substantially as announced. In this case, there was significant delay between the time that the contest concluded and Saga awarded the memorabilia prize – more than six months according to Saga's own submission.¹³ Moreover, this prize was not awarded until after the complainant had filed his complaint with the Commission and the Commission had initiated an investigation by issuing a Letter of

⁶ See letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Saga Communications of New England, L.L.C., dated January 24, 2006 ("LOP").

⁷ See letter from Lawrence D. Goldberg, Vice President, Saga Communications of New England, L.L.C., to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, dated February 28, 2006, and filed through its counsel on March 2, 2006 ("Response"). Counsel for Saga sought and received a one-week extension of time in which to file its response.

⁸ *Id.* at 4.

⁹ See *id.* at 4-5.

¹⁰ See *id.* at 3.

¹¹ 47 C.F.R. § 73.1216.

¹² See 47 C.F.R. § 73.1216, notes 1(b) and 2. Note 1 to that rule provides in relevant part that the material terms of a contest include "how to enter or participate; eligibility restrictions; entry deadline dates; whether prizes can be won; when prizes can be won;" and "time and means of selection of winners." Note 2 to the rule states:

In general, the time and manner of disclosure of the material terms of a contest are within the licensee's discretion. However, the obligation to disclose the material terms arises at the time the audience is first told how to enter or participate and continues thereafter. The material terms should be disclosed periodically by announcements broadcast on the station conducting the contest, but need not be enumerated each time an announcement promoting the contest is broadcast. Disclosure of material terms in a reasonable number of announcements is sufficient. In addition to the required broadcast announcements, disclosure of material terms may be made in a non-broadcast manner.

¹³ The contest winners were picked at a drawing on July 17, 2005, and the memorabilia were delivered to the complainant on February 8, 2006. See *Response* at 3-4.

Inquiry to the licensee.¹⁴

6. Although the contest-specific rules in this case are silent on the issue of when the prizes will be delivered,¹⁵ we believe that licensees are obligated to provide all promised prizes in a reasonably prompt manner in such circumstances, consistent with their overall duty to conduct broadcast contests fairly and without deception. Timely fulfillment is an implied term of any contest in which prizes are advertised, unless contest rules expressly state to the contrary, and no such contrary provision is present here.¹⁶ Saga's six-month delay in awarding the memorabilia prize constitutes a failure to comply with that term.¹⁷ We find, therefore, that Saga failed to conduct its contest substantially as announced and thus violated Section 73.1216 of our rules.¹⁸ That the lapses in this case may have been due to either negligence or inadvertence does not absolve Saga of liability because licensees are responsible for the acts of their employees.¹⁹ Finally, even if Saga has since taken steps to improve its contest award procedures, and provided additional compensation to the contest winner for the inconvenience he experienced, neither factor excuses the licensee's apparent rule violation.²⁰

7. Under Section 503(b)(1) of the Communications Act of 1934, as amended (the "Act"), any person who is determined by the Commission to have willfully or repeatedly²¹ failed to comply with any

¹⁴ See *supra* note 6.

¹⁵ See *Response* at 2, Attachment 4, unnumbered pages 1-2.

¹⁶ If anything, the rules applicable to this contest suggest that prizes would be awarded no more than 30 days from the drawing. The generic contest rules submitted by Saga, which it asserts applied to this contest (see *Response* at 2), provide that "[w]inners will be expected to claim prize . . . within 30 days of being notified that they are winners, unless there is an expiration date on prize which will be specifically stated." *Response* at Attachment 4, unnumbered pages 3-4 (item no. 9).

¹⁷ Where a licensee fails to complete award of a promised prize until after a complaint is filed with the Commission, the Commission has found that a contest rule violation has occurred. See, e.g., *Lesnick Communications, Inc.*, Notice of Apparent Liability, 13 FCC Rcd 23696 (Mass Med. Bur. 1998).

¹⁸ In the circumstances of this case, we need not reach whether the one-month delay in delivering the car-lease or cash-equivalent prize was unreasonable.

¹⁹ See *Nationwide Communications Inc.*, Notice of Apparent Liability, 9 FCC Rcd 175 (Mass Med. Bur. 1994) (forfeiture for violating contest rules imposed, notwithstanding licensee's contention that its failure to conduct a contest substantially as announced was due to "inadvertence"), *forfeiture reduced*, Memorandum Opinion and Order, 9 FCC Rcd 2054 (Mass Med. Bur. 1994) (licensee's history of compliance with Commission rules warranted forfeiture reduction, whereas licensee's general good faith efforts, "awarding the contest prize as announced, and receiving no benefit from its error" did not).

²⁰ See, e.g., *Capstar TX Limited Partnership (WKSS(FM))*, Notice of Apparent Liability, 20 FCC Rcd 10636 (Enf. Bur. 2005) (forfeiture paid) (licensees's remedial efforts undertaken after complaint lodged not mitigating) citing *AT&T Wireless Services, Inc.*, Notice of Apparent Liability, 17 FCC Rcd 21866, 21871 (2002) and *KVGL, Inc.*, Memorandum Opinion and Order, 42 FCC 2d 258, 259 (1973).

²¹ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. See *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, (continued....)

provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty.²² In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.²³ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.²⁴

8. Based upon the evidence before us, we find that Saga apparently willfully violated Section 73.1216 of the Commission's rules. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$4,000 for failure to conduct a station contest substantially as announced.²⁵ In assessing the monetary forfeiture amount, we must take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act,²⁶ which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require. We conclude that the violation here primarily occurred due to inadequate planning and control, and not due to a deliberate attempt to deceive²⁷ and that the base forfeiture amount of \$4,000 is appropriate in this case.

IV. ORDERING CLAUSES

9. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,²⁸ and Sections 0.111, 0.311, and 1.80 of the Commission's rules,²⁹ that Saga Communications of New England, L.L.C., is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of \$4,000 for willfully and repeatedly violating Section 73.1216 of the Commission's rules.

10. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules, that within thirty (30) days of the release of this *NAL*, Saga Communications of New England, L.L.C., **SHALL**

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Notice of Apparent Liability, 16 FCC Rcd 1359 (2001) ("*Callais Cablevision, Inc.*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

²² See 47 U.S.C. § 503(b)(1)(B); see also 47 C.F.R. § 1.80(a)(1).

²³ See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²⁴ See 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f).

²⁵ See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b).

²⁶ See 47 U.S.C. § 503(b)(2)(D).

²⁷ See, e.g., *New Northwest Broadcasters, L.L.C.*, Notice of Apparent Liability, 19 FCC Rcd 9352 (Enf. Bur. 2004) (forfeiture paid) (base forfeiture amount imposed where contest not conducted substantially as announced and no other compounding factors were present).

²⁸ See 47 U.S.C. § 503(b).

²⁹ See 47 C.F.R. §§ 0.111, 0.311 and 1.80.

PAY the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

11. **IT IS FURTHER ORDERED**, that payment of the forfeiture shall be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

12. The response, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B433, Washington, D.C. 20554 and **MUST INCLUDE** the NAL/Acct. No. referenced above.

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

14. Requests for payment of the full amount of this *NAL* under an installment plan should be sent to: Associate Managing Director -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.³⁰

15. **IT IS FURTHER ORDERED** that the complaint filed by Mr. Robert Naginewicz **IS GRANTED** to the extent indicated herein, and the complaint proceeding **IS HEREBY TERMINATED**.³¹

16. **IT IS FURTHER ORDERED** that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Saga Communications of New England, L.L.C., 73 Kercheval Avenue, Grosse Pointe Farms, Michigan 48236, by regular mail to its counsel, Gary S. Smithwick, Esq.,

³⁰ See 47 C.F.R. § 1.1914.

³¹ For purposes of the forfeiture proceeding initiated by this NAL, Saga Communications of New England, L.L.C., shall be the only party to this proceeding.

Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, N.W., Suite 301, Washington, D.C. 20016, and to the Complainant, Mr. Robert Naginewicz, 119 Fernwood Street, Chicopee, Massachusetts 01020.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro
Chief, Investigations and Hearings Division